No. 85-1315 (3)

Supreme Court, U.S.
FILED
MAR 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WARREN KOSHER and CHRISTINE KOSHER,

Petitioners,

—v—

TIMMY STAMATIS and LISA STAMATIS,

Respondents,

—and—

ROBERT ABRAMS, Attorney General
of the State of New York,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR RESPONDENT NEW YORK STATE ATTORNEY GENERAL IN OPPOSITION

ROBERT HERMANN
Solicitor General

O. PETER SHERWOOD
Deputy Solicitor General

ROBERT J. SCHACK
JANE LEVINE
Assistant Attorneys General
of Counsel

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney Pro Se
Two World Trade Center
New York, New York 10047
(212) 488-2469

15147

Question Presented

Should *certiorari* be denied where there is an independent and adequate state ground for the decision of New York's Court of Appeals and where, in any event, petitioners' federal claims are foreclosed by a recent decision of this Court?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Statement of the Case	1
A. The Facts	1
B. The Family Court Decisions and Orders	2
C. The Appellate Division, Second Department, Decision and Order	3
D. The Court of Appeals Decision an Order	4
ARGUMENT –	
CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE NEW YORK COURT OF APPEALS RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND, AND PETITIONERS' CONSTITUTIONAL ISSUES ARE FORECLOSED BY A RECENT DECISION OF THIS COURT	6
Conclusion	9

TABLE OF AUTHORITIES

	Page
I. Cases	
Cichos v. Indiana, 385 U.S. 76 (1966)	6
Florida v. Casal, ___ U.S. ___, 103 S. Ct. 3100 (1983)	6
Herb v. Pitcairn, 324 U.S. 117 (1945)	6
Lehr v. Robertson, 463 U.S. 248 (1983)	7,7n
McCullough v. Kammerer Corp., 323 U.S. 327 (1945)	6
Morris v. Weinberger, 410 U.S. 422 U.S. 422 (1973)	5n
Murel v. Baltimore City Criminal Court, 407 U.S. 359 (1972)	5n
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)	5n,6
Rudolph v. United States, 370 U.S. 269 (1962)	5n
United States v. Rimer, 220 U.S. 547 (1911)	6
Wilson v. Loew's Inc., 355 U.S. 597 (1958)	6
Matter of Jessica XX, 54 N.Y.2d 417 (1981), *aff'd sub nom. Lehr v. Robertson*, 463 U.S. 248 (1983)	7n
II. Statutes	
U.S. Supreme Court Rule 17.1	5n,7
United States Constitution Am. 14	3

	Page
New York Civil Practice Law and Rules § 1012(b)	1n
New York Domestic Relations Law Art. 7	7n
New York Domestic Relations Law § 112.....	7n
New York Domestic Relations Law § 115.....	7n
New York Domestic Relations Law § 115-b	*passim*
New York Domestic Relations Law § 116.....	7n
New York Executive Law § 71	1n

Statement of the Case

A. *The Facts*

Petitioner Warren Kosher is an attorney. Petitioner Christine Kosher, his wife, is a former teacher and business executive with some post-graduate training. They are the biological parents of Sarah, who was diagnosed as having Down's Syndrome when she was born November 6, 1983. (A.* 2-3, 112-3). The Family Court, Suffolk County, found (A. 113-7), and the New York Court of Appeals affirmed (A. 3-5), that petitioners received counselling at Sarah's birth on alternatives to adoption, but that because of her disability, they were set on adoption and cut off suggestions to consider any other course of action.**

Without taking her from the hospital, petitioners arranged to have Sarah adopted by the Stamatis family (hereinafter "respondents"). (A. 3-5, 114). Warren's law partner made arrangements with respondents' attorney for transfer of the physical custody of Sarah and preparation of the papers for a private placement adoption, pursuant to New York Domestic Relations Law (D.R.L.) § 115-b. (A. 4-5, 114-20). The papers included two adoption consent forms, one to be signed in court, and the other for extrajudicial consent. (A. 5-9). At petitioners' request, respondents' attorney added language in both consent forms to the effect that petitioners were giving up Sarah because of her Down's Syndrome. (A. 9). In accordance with D.R.L. § 115-b(1)(d) (i), (3)(a), the extrajudicial consent form provided that it became

> "irrevocable thirty days after the commencement of the adoption proceeding unless written notice of revocation

---

*References to the Appendix to the Petition herein are indicated by the prefix "A.".

**The Attorney General intervened herein on the appeal from the Family Court to the Appellate Division, Second Department, as a party respondent in defense of the constitutionality of New York Domestic Relations Law § 115-b, pursuant to New York Civil Practice Law and Rules § 1012(b) and New York Executive Law § 71.

> thereof shall have been received by this Court [i.e., the Family Court] within said thirty days."

(A. 38).

The physical transfer of custody to the adoptive parents occurred November 11, 1983, at the hospital. (A. 5). Two weeks later, on November 26 or 27, 1983, Warren read all the adoption forms in "no more than two minutes" and signed them. (A. 6). Christine asked Warren about the forms and then signed without reading them. (A. 10).

Respondents filed their adoption petition December 19, 1983. On January 23, 1984, Warren's law partner was notified by the Family Court that the petition had been filed and a hearing set for March 1, 1984. More than thirty days later, on February 28, 1984, petitioners told the law partner that they wanted to revoke. (A. 10). On February 29, 1984, after reading D.R.L. § 115-b, he and Warren prepared a form to revoke consent to the adoption, and petitioners signed it. The Family Court received the signed form on March 2, 1984. (A. 11).

On the return of the adoption petition, the Family Court held a lengthy hearing on the validity of the original consent. (A. 11-2) Petitioners challenged the validity of the consent based on duress, illegality of the adoptive placement, lack of counsel, and assorted constitutional claims. (A. 12-4).

B. *The Family Court Decisions and Orders*

The Family Court's September 18, 1984, decision rejected all of petitioners' non-constitutional claims. With respect to petitioners' constitutional challenges, the Judge held that they lacked standing to challenge, as violations of due process, D.R.L. § 115-b's alleged failure to require notice of when the "thirty day revocation period" begins (A. 153-5), and the extrajudicial consent form's alleged failure to provide an adequate description of

the limited nature of petitioners' right to revoke consent.* (A. 155-8).

The Judge ruled that Warren and his law partner had the opportunity to review the relevant statutes and "the ability to understand adoption law, if so motivated... ." (A. 146). He found, nonetheless, that as a result of a mistake of law, when petitioners signed the consent forms, they believed them to be "tentative", subject to confirmation in court. (A. 161).

The Judge noted that mistake of law was not one of the grounds listed in D.R.L. § 115-b(4) ("fraud, duress or coercion"), upon which a biological parent can seek to void his or her consent after the thirty day revocation period. (A. 158-9). He held, however, that strict enforcement of petitioners' consent would violate their right to due process of law as applied. (A. 158-61).

Ruling that the appropriate remedy was to treat as timely their otherwise belated attempt to revoke the consent, he ordered a hearing under the statute to determine whether the best interests of the child required that the revocation be permitted, and as to the issue of Sarah's custody. (A. 165-7).

By decision and order dated November 7, 1984, following a "best interests" hearing conducted over the course of a month, the Family Court granted judgment to respondents.

C. *The Appellate Division, Second Department, Decision And Order*

In a plurality opinion dated August 19, 1985, for the Appellate Division, Second Department, two Justices held that D.R.L. § 115-b was constitutionally defective for failure to give notice as to the consequences of signing the extrajudicial consent form,

---

*Pursuant to D.R.L. § 115-b(1)(d)(ii), (3)(d), a timely revocation leads to automatic return of the child to a biological parent not alleged to be unfit only if the proposed adoptive parents do not oppose the revocation. If they oppose, a hearing is held to determine the appropriate disposition of the child's custody, based solely on the child's best interests.

and ordered that Sarah be returned to petitioners.* (A. 59-65). Two other Justices did not reach the constitutional issues but found that petitioners had not given final consent. (A. 81-2). The dissenter rejected petitioners' constitutional claims and would have upheld the adoption as being in Sarah's best interests. (A. 83-4, 93-102).

D. *The Court of Appeals Decision and Order.*

On November 14, 1985, the New York Court of Appeals unanimously reversed, "without reach[ing] the constitutionality of the statute." (A. 42-4). It read D.R.L. § 115-b to require notice of the consequences of revocation to persons entitled to consent to adoption, and to trigger such persons' time to revoke upon their receipt of notice of the filing of the adoption petition. (A. 34).

Petitioners were not helped by that reading of the statute, for they failed to revoke within 30 days of receiving notice of the adoption. (A. 42). Under State law, since their alleged misunderstanding of how long they had to revoke was based on their own acts and not caused by the adoptive parents or the language of the consent forms, it did not extend the time to revoke. (A. 37-9).

As a result of their untimeliness, the Court held, petitioners had lost the right to revoke and therefore could not claim harm from lack of notice as to their rights upon revocation. They, therefore, lacked standing to challenge the statute's notice of rights provisions (A. 34-6) and were bound by their consent to the adoption. (A. 42). The adoption should, accordingly, have been granted without a best interests hearing, and their constitutional claims concerning that hearing did not have to be reached. (A. 42-3).

---

*The order for return was stayed. Sarah remained with respondents from the time she left the hospital and throughout the litigation. On December 12, 1985, she formally became a legal member of respondents' family with the entry of the adoption order. (Brief of Respondents Adoptive Parents in Opposition to Petition, pp. 1 n. 1, 24).

The Court concluded by calling for legislative attention to the statute.* (A. 44).

---

*The Attorney General notes that he has been informed that the New York State Legislature has reached agreement on a bill to be acted upon at this session that would codify the holdings of the Court below as to the requirement for notice to natural parents of the consequences of revoking consent to a private placement adoption and that would change the period in which the natural parents may revoke to forty-five days after the execution of an extrajudicial consent. Assuming the legislation is enacted, therefore, it will remove from future private placement adoptions in New York the questions as to notice that petitioners raise here. Under similar circumstances in past cases, the Court has found a grant of *certiorari* to have been improvident. *See Morris v. Weinberger*, 410 U.S. 422 U.S. 422 (1973) (writ dismissed where statute was amended following the granting of *certiorari*); *Murel v. Baltimore City Criminal Court*, 407 U.S. 359, 359 (1972) (writ of *certiorari* dismissed as improvidently granted where relevant statutes are "undergoing substantial revision"); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 76-77 (1955) (writ dismissed where corrective legislation had been enacted and the injustice alleged in the case assumed "isolated significance"). In the present case, petitioners' concerns under the former statute have been addressed by three tiers of state courts. Following enactment of the new legislation, this Court might find review by *certiorari* inappropriate, since the review "would be of no importance save to the litigants themselves." *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (*per curiam*). *See Rice v. Sioux City Cemetery, supra*, 349 U.S. at 78 n. 2; Supreme Court Rule 17.1 ("review on writ of *certiorari* ... will be granted only when there are special and important reasons therefor").

ARGUMENT

CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE NEW YORK STATE COURT OF APPEALS RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND, AND PETITIONERS' CONSTITUTIONAL ISSUES ARE FORECLOSED BY A RECENT DECISION OF THIS COURT.

Certiorari should be denied because there is an independent and adequate state ground for the decision of the New York Court of Appeals which precludes this Court's review. *Florida v. Casal*, ____ U.S. ____, 103 S. Ct. 3100 (1983); *Wilson v. Loew's Inc.*, 355 U.S. 597 (1958); *Herb v. Pitcairn*, 324 U.S. 117, 125-6 (1945). The case does not, in any event, present any federal constitutional question meriting review. *See Cichos v. Indiana*, 385 U.S. 76, 80 (1966); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 78 n. 2 (1955); *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328-9 (1945); *United States v. Rimer*, 220 U.S. 547, 548 (1911).

Each of petitioners' Questions Presented is based on the premise that petitioners had a Federal constitutional right to actual knowledge of their statutory rights before the adoption could be approved without their consent. The New York Court of Appeals, however, held that petitioners' lack of knowledge as to the statutory revocation period occurred, not because of a lack of actual notice, but because petitioners had made a mistake of law as to the period in which they could revoke. This "mistake of law" did not vitiate consent under New York law, and petitioners' failure to comply with the statutory time period in which to revoke acted as a procedural bar to their standing to raise their claim of lack of actual knowledge of their statutory rights upon timely revocation. Accordingly, petitioner's procedural default resulted in an adequate, independent state ground for the decision below. *See* pp. 5-6 *ante*.

Moreover, even if there were no independent and adequate state ground barring review of petitioners' claims, this Court still should not grant certiorari because the petition does not present any

"special and important reasons therefor". Supreme Court Rule 17.1. Since all three of petitioners' questions presented bottom on the same assumed Federal constitutional right to actual knowledge of their statutory rights, none of the questions is properly presented by this record unless there is such a right. In *Lehr v. Robertson*, 463 U.S. 248, 265 & n. 23 (1983), this Court rejected the same claim by a layman, represented by counsel, who raised due process and equal protection challenges to New York's provisions for notice to putative fathers of adoption. A layperson, the *Lehr* Court held, is presumed capable of defending his own interests and will not be excused from complying with the statutory procedure for asserting his parental rights because the law is obscure or because he took other steps outside the relevant statute to assert his interest. *Id.* In the present case, one petitioner arguing ignorance and mistake of law is a lawyer who was assisted by his law partner, and the other is the lawyer's wife, to whom he gave legal advice. *See* pp. 1-2 *ante*.

Petitioners attempt to distinguish *Lehr* on the ground that the putative father there was not a party to the adoption he sought to challenge. Petition, p. 31 n. 5. The present petitioners, however, also were not parties when they received notice,* and *Lehr* is thus dispositive of their claims.

---

*Under New York law, the adoptive child is the subject of the adoption proceeding. The petition is filed by the adoptive parents, who are denominated "petitioners". The petition must show that all persons entitled to consent to the adoption have consented, or they must consent in open court. But the persons consenting are not parties and are nowhere referred to as such in the statutes. *See* D.R.L. §§ Article 7, espec. §§ 112(2)-(3), (5), 115(1), 116(2). Thus, the standard adoption form caption contains the names of the children (often under pseudonyms or only by first initial) and, in some localities, those of the petitioners. (*See, e.g.*, A. 6, 8). As illustrated by *Lehr* and this case, a person claiming the right to consent may oppose the adoption and if timely, will be added to the caption as a party respondent. But until the person asserts a timely claim in opposition, he or she does not become a party. *See Matter of Jessica XX*, 54 N.Y.2d 417, 423, 425, 427-31 & n. 7 (1981), *aff'd sub nom. Lehr v. Robertson*, 463 U.S. 248 (1983). Accordingly, at the time that petitioners herein received notice pursuant to D.R.L. § 115-b of the filing of the adoption proceeding, they were not yet parties and even on petitioners' theory, had no right to greater or different notice.

Since petitioners cannot plead ignorance or mistake of the law, they are, as New York's highest court held (A. 42), bound by their consents. Because they are thus bound, they may not collaterally challenge the consents by attacking the adequacy of the showing of intent to waive parental rights when they executed the consent forms (Question 1), their actual understanding of the consequences of signing the consent forms (Question 2), or their alleged good cause for failing to timely exercise their right to revoke (Question 3), a right that was explicitly set out in the extrajudicial consent form. (A. 6-7). *See* p. 2 *ante*.

Finally, in posing their Questions Presented, particularly the second, petitioners suggest that the courts below found that they did not intend to give up their child. To the contrary, the undisturbed findings of fact of the New York courts were that petitioners had a settled intent to consent to the child's adoption. (A. 12-3, 59, 77, 84-6, 135-6). Their claim that they mistakenly believed that they would still have a chance to revoke on the return date of the adoption proceeding is belied by the fact that they did try to revoke before that date. *See* p. 2 *ante*. But even if the claim of a mistake is accepted, their misunderstanding that they had additional time cannot alter the uniform findings below that they sat on their hands throughout the period during which they had actual notice and the statutory right to revoke, intentionally not doing so.

CONCLUSION

CERTIORARI SHOULD BE DENIED BECAUSE THERE IS AN INDEPENDENT AND ADEQUATE STATE GROUND FOR THE DECISION BELOW, AND EVEN IF REVIEW WERE NOT SO BARRED, PETITIONERS PRESENT NO FEDERAL CONSTITUTIONAL ISSUE MERITING THIS COURT'S REVIEW.

Dated: New York, New York
March 24, 1986

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney Pro Se

ROBERT HERMANN
Solicitor General

O. PETER SHERWOOD
Deputy Solicitor General

ROBERT J. SCHACK
JANE LEVINE
Assistant Attorneys General
of Counsel